

FEDERAL CIRCUIT COURT OF AUSTRALIA

LU v MINISTER FOR IMMIGRATION & ANOR

[2019] FCCA 1330

Catchwords:

MIGRATION – Application for judicial review of decision of Administrative Appeals Tribunal affirming decision not to grant Partner visa – whether the Tribunal considered whether the applicant and sponsor were in a genuine and continuing relationship not by reference to the relationship as it existed at the time the Tribunal made its decision but by reference to the circumstances in which the applicant and the sponsor agreed to marry – whether the s.359A of the *Migration Act 1958* (Cth) (**Act**) applied to previous representation made by the applicant – whether s.359A of the Act applied to information covered by a certificate purportedly issued under s.375A of the Act – whether applicant not given notice of the substance of the information covered by the certificate purported issued under s.375A of the Act – no jurisdictional error.

Legislation:

Migration Act 1958 (Cth), ss.5F, 359A, 359AA, 360, 375A, 424A

Migration Regulations 1994 (Cth), regs.1.15A

Migration Regulations 1994 (Cth), Schedule 2, cl.801.221

Cases cited:

Malhi v Minister for Immigration & Anor [2017] FCCA 119

Minister for Immigration and Border Protection v SZMTA; *CQZ15 v Minister for Immigration and Border Protection*; *BEG15 v Minister for Immigration and Border Protection* [2019] HCA 3

Minister for Immigration and Citizenship v SZLFX [2009] HCA 31

Plaintiff M174/2016 v Minister for Immigration and Border Protection [2018] HCA 16

SZBYR v Minister for Immigration and Citizenship [2007] HCA 26

Applicant:

LU

First Respondent:

MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent:

ADMINISTRATIVE APPEALS
TRIBUNAL

File Number:

SYG 549 of 2017

Judgment of: Judge Manousaridis

Hearing date: 17 May 2018

Date of Last Submission: 17 May 2018

Delivered at: Sydney

Delivered on: 22 May 2019

REPRESENTATION

Counsel for the Applicant: Ms U Okereke-Fisher

Solicitors for the Applicant: Vietaust Lawyers

Counsel for the Respondents: Ms N Case

Solicitors for the Respondents: HWL Ebsworth Lawyers

ORDERS

(1) The application is dismissed.

(2)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 549 of 2017

LU

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction

1. The applicant, a citizen of Vietnam, applies for judicial review of a decision made by the second respondent (**Tribunal**) affirming the decision of a delegate of the first respondent (**Minister**) not to grant the applicant a Partner (Residence) (Class BS) visa (**Partner visa**).

Partner visa requirements

2. To have been entitled to a Partner visa the applicant had to satisfy, among other things, the criterion specified in cl.801.221(2)(c) of Schedule 2 to the *Migration Regulations 1994* (Cth) (**Regulations**) as those Regulations stood at the time the applicant applied for the Partner visa.¹ That paragraph

¹ The applicant lodged an application for a Partner (Temporary) (Class UK) (Subclass 820) visa and a Partner (Residence) (Class BS) (Subclass 801) visa on 13 March 2013. For ease of expression I will

requires that at the time of decision the applicant “*is the spouse or de facto partner of the sponsoring partner*”. Subsection 5F(1) of the *Migration Act 1958* (Cth) (**Act**), as it stood at the time the applicant applied for the Partner visa, provided that a person is the “*spouse*” of another person if, under s.5F(2) of the Act, the two persons are in a “*married relationship*”. Under s.5F(2) of the Act persons are in a “*married relationship*” if:

- a) they are married to each other under a marriage that is valid for the purposes of this Act; and
- b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
- c) the relationship between them is genuine and continuing; and
- d) they:
 - i) live together; or
 - ii) do not live separately and apart on a permanent basis.

3. Subsection 5F(3) of the Act provides that the Regulations “*may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist*”. The Regulations have made provision, and this is to be found in reg.1.15A of the Regulations. Subregulation 1.15A(2) provides that, when considering an application for a Partner visa (among other subclasses of visas), the Minister must consider all the circumstances of the relationship, including the matters set out in reg.1.15A(3) of the Regulations. Those matters are:

- a) the financial aspects of the relationship, including any joint ownership of real estate or other major assets; any joint liabilities; the extent of any pooling of financial resources, especially in relation to major financial commitments; whether one person in the relationship owes any legal obligation in respect of the other; the basis of any sharing of day-to-day household expenses; and
- b) the nature of the household, including any joint responsibility for the care and support of children; the living arrangements of the persons; and any sharing of the responsibility for housework; and

speak of the Regulations and the Act in the present tense, it being borne in mind that it is the Regulations and the *Migration Act 1958* (Cth) as they stood at 7 March 2013 that are relevant.

- c) the social aspects of the relationship, including whether the persons represent themselves to other people as being married to each other; the opinion of the persons' friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities; and
 - d) the nature of the persons' commitment to each other, including the duration of the relationship; the length of time during which the persons have lived together; the degree of companionship and emotional support that the persons draw from each other; and whether the persons see the relationship as a long-term one.
4. In addition, the applicant was required to comply with cl.801.221(2)(d) of Schedule 2 to the Regulations which provided that at least two years have elapsed since the application was made.

The progress of the applicant's claim for a Partner visa

5. In a statement that accompanied her application,² the applicant said that she first met the sponsor on 21 April 2010 at the airport in Saigon when the sponsor first visited her. The sponsor visited the applicant after the applicant had agreed to her aunt's suggestion that she might wish to befriend the sponsor. By 4 May 2010 the sponsor proposed marriage to the applicant. The applicant accepted the sponsor's proposal after she consulted with her family. On 4 May 2010 the applicant and sponsor participated in an engagement ceremony. The sponsor returned to Australia on 18 May 2010. In August 2010 the applicant applied for, but was refused, a visitor visa to enter Australia. The applicant and sponsor decided to have a wedding reception in Vietnam and sign a wedding certificate in Australia. The sponsor returned to Vietnam in December 2010, and he and the applicant held a wedding reception in Vietnam.
6. The applicant entered Australia on 22 January 2013 as the holder of a prospective spouse visa. The applicant and the sponsor married on 3 February 2013. The applicant applied for a Partner (Temporary) (Class UK) (Subclass 820) visa and a Partner visa on 13 March 2013, and on 26 June 2014 the applicant was granted a subclass 820 visa.

² CB45-46

7. By letter dated 19 November 2015 the Department of Immigration and Border Protection (as the Department of Home Affairs was then known) (**Department**) informed the applicant that the Department had received “*unfavourable information that you and your sponsor are in a contrived relationship, that you have paid your sponsor \$30,000 to \$40,000 to sponsor you for the permanent visa and that your sponsor has often resided with*” a person identified in the letter.³ The letter also set out the following matters:
- a) The applicant stated in her declaration that the sponsor’s salary is credited to his personal account out of which fortnightly payments are made towards the repayment of a home loan. The sponsor’s bank account, however, shows that repayments are being made to a personal loan account.
 - b) Departmental officers attempted to contact the applicant and the sponsor several times but they could not locate the applicant or the sponsor at the applicant’s nominated address. Further, when a photograph of the sponsor was shown to tenants at the address they said the sponsor did not reside at that address.
8. The letter invited the applicant to respond to these matters. The applicant and the sponsor each responded by providing statutory declarations.⁴ The applicant claimed her husband slept during the day, she asserted that a particular tenant had admitted informing the Department that the sponsor did not live at the premises and the applicant requested that the tenant contact the department and explain why she had responded to the Department officer’s question in the way she did, but the tenant had left the following day; and the applicant denied she paid her husband \$30,000 to \$40,000. The sponsor gave a similar response in his statutory declaration.
9. The “*unfavourable information*” to which the Department’s letter referred is in evidence.⁵ It is an internal Departmental communication that records the effect of a report from an anonymous female. After the delegate decided not to grant the applicant a Partner visa a delegate of the Minister signed a certificate in relation to this internal communication purportedly pursuant to s.375A of the Act (**375A**

³ CB204

⁴ CB224-228

⁵ Affidavit of K E Garaty 10.05.2018, exhibit KEG1

Certificate). According to its reasons for decision the Tribunal “discussed the substance of the allegation in the course of the hearing”.⁶

10. Tribunal’s reasons

11. The Tribunal accepted the applicant and the sponsor are validly married. The Tribunal also acknowledged that the applicant and sponsor had presented a substantial amount of documentary evidence. The Tribunal noted, however, that the documents the applicant and sponsor provided could be obtained even where a relationship is not genuine; and, for that reason, it did not find the documentary evidence “*to be dispositive of the issues at hand*”.⁷
12. The Tribunal found the parties had been untruthful in their evidence concerning the sponsor’s divorce and, more generally, of their relationship and the timing of their decisions; and, for that reason, it did not accept that the applicant and sponsor first met in April 2010 and had no prior knowledge of each other and that they only made the decision to marry within two weeks of the sponsor’s travel to Vietnam. The Tribunal found that a much more likely explanation is that the couple, or their relatives, discussed the marriage before the sponsor travelled to Vietnam, and that caused him to initiate the divorce proceedings before March 2010. The Tribunal found the applicant and the sponsor “*fabricated their evidence on this issue*”.⁸ The Tribunal relied on a number of matters.
 - a) The first was the “*haste with which the decision was made*” to marry.⁹ The Tribunal was not convinced it is possible to form a committed relationship in such a short period, within ten days of first meeting each other, particularly as the parties had no (claimed) contact with each other before they met.¹⁰
 - b) The Tribunal found that the descriptions the applicant and sponsor gave of what attracted them to each other “*appeared studied and carefully planned*”.¹¹

⁶ CB414, [7]

⁷ CB414, [8]

⁸ CB416, [17]

⁹ CB414, [10]

¹⁰ CB414, [10]

¹¹ CB414, [10]

- c) The Tribunal formed the view the parties had not been truthful in their evidence about the sponsor's previous divorce. The applicant said the sponsor divorced his former wife because they were thinking about marrying. The sponsor, too, said he decided to marry the applicant after he met her, and decided to divorce his former wife. The applicant, however, had provided with her application the sponsor's divorce certificate that showed the applicant divorced his wife in March 2010, before he claimed to have met the applicant.¹²
- d) In the application the applicant completed in 2010 for a visitor visa she did not mention she was engaged to the sponsor, even though "*the standard application form for sponsored Visitor visas does provide for 'engaged' as a relationship status*". The Tribunal did not accept the applicant's explanation for not having recorded she was engaged to the sponsor and, therefore, found the applicant was willing to provide false or misleading information to the Department which, in turn, suggested the applicant is not a person of credit.¹³
13. Next, the Tribunal considered the financial arrangements between the applicant and the sponsor. Although the Tribunal accepted there was a joint bank account into which the applicant's pay was deposited every week, the sponsor appeared to have very little knowledge about the joint account. The sponsor, for example, did not know when the applicant's money was deposited into the joint account, and he could not state when the last significant transaction on the joint account occurred. The Tribunal, therefore, found that the parties keep their finances separate. Further, although both the applicant and the sponsor said the sponsor had significant credit card debt, the applicant had some difficulty explaining how the debt was acquired, the Tribunal noting that the size of the credit card debt – \$30,000 – was sufficiently significant for the couple to have discussed it. The Tribunal, therefore, was not satisfied the couple "*had adequate conversations about their financial arrangements*".¹⁴ The Tribunal acknowledged there was other evidence regarding the finances, such as life insurance policies, superannuation and "*other documents*", and it was prepared to accept there was some degree of sharing of resources. Given what the Tribunal found

¹² CB415, [13], [14]

¹³ CB416, [18]

¹⁴ CB417, [20]

were the deficiencies in their knowledge, the Tribunal was “*concerned that these arrangements were made for the benefit of the visa application*”.¹⁵

14. The Tribunal then considered the social aspects of the parties’ relationship. The Tribunal acknowledged there are statements from third parties attesting to their belief the relationship between the applicant and the sponsor is a genuine one, and also referred to the declaration made by the sponsor’s father; and the Tribunal was prepared to accept that these persons genuinely believe the applicant and the sponsor are in a genuine relationship. The Tribunal also accepted that the applicant and sponsor plan and undertake joint social activities, and represent themselves to others as being in a relationship.¹⁶ The Tribunal found, however, that the applicant and the sponsor have shown a very limited interest in each other’s family.¹⁷ The applicant had “*minimal knowledge about the sponsor’s family*”; she was not sure where the sponsor’s children were studying or what courses they were doing; the applicant said that one of the sponsor’s siblings was a handyman and another was in the army, but she had no knowledge of the sponsor’s other siblings; and she did not have much contact with the sponsor’s siblings. Although the applicant said her father had leg pain and her mother has liver problems, the sponsor said the applicant’s father had leg pain but the mother is healthy. The sponsor was entirely unaware of the applicant’s mother’s condition and regular check-ups.¹⁸
15. Although the Tribunal accepted the applicant and the sponsor live together, it was not satisfied they established a joint household; and the Tribunal found they are living together “*for the purpose of this visa application only*”. The Tribunal relied on “*the various concerns set out above, and the Tribunal’s overall finding about the applicant’s lack of credit*”.¹⁹ And although the Tribunal accepted the applicant and sponsor had lived together for a lengthy time, the Tribunal was concerned by the applicant’s having twice travelled to Vietnam by herself.²⁰ Further, although the Tribunal found that much of the oral evidence the applicant and sponsor gave was consistent, the Tribunal said it formed

¹⁵ CB417, [21]

¹⁶ CB417, [22]

¹⁷ CB418, [25]

¹⁸ CB417-418, [22]-[24]

¹⁹ CB418, [27]

²⁰ CB418, [29]

the view that the applicant had memorised the information she thought she would be questioned about at the hearing.²¹

16. The Tribunal found the applicant and sponsor had limited interest in each other's affairs; their plans for the future were very vague, including having children and buying a house in circumstances where they both agreed they have no savings, and they both have significant debts.²² The Tribunal was not convinced the applicant and sponsor had given genuine thought to such plans. The Tribunal was not satisfied that the applicant and sponsor view their relationship as a long term one or that, after their marriage, they rely on each other for comfort and emotional support, or that there exists a mutual commitment to the relationship.²³

17. The Tribunal concluded as follows: ²⁴

18. The Tribunal acknowledges that some of the evidence points to the existence of a genuine and committed relationship. However, having regard to the Tribunal's concerns set out above, and having regard to all the circumstances of this relationship, the Tribunal is not satisfied that at the time of this decision the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is not satisfied their relationship is genuine and continuing. The Tribunal is not satisfied the parties are in a spousal relationship. Therefore the applicant does not meet cl.801.221(2)(A). . . .

19. Grounds of application

20. The applicant relies on grounds 2, 3, and 5 of the (further) amended application.²⁵

21. *Ground 2*

22. Ground 2 is as follows:

²¹ CB418, [30]

²² CB418-419, [31]

²³ CB419, [31]

²⁴ CB419, [32]

²⁵ On 15 June 2017 the applicant filed an amended application and on 4 May 2018 the applicant filed a further amended application, but it is titled "*Amended Application*".

23. *Jurisdictional error: The Tribunal failed to apply the correct test in construing “genuine and continuing” for the purpose of assessment required under s 5F of the Act.*

24. *PARTICULARS*

25. *In paragraphs 10-18 Tribunal dedicated considerable weight to the events leading up to the Applicant’s marriage for the purpose of determining whether the parties’ relationship at the time of decision was genuine and continuing. However, the task before the Tribunal was to review all aspects of the Couple’s relationship at the time of decision for the purpose of making a decision as to whether the applicant was the spouse of the Sponsor at the time of decision (including whether or not their relationship was genuine and continuing at the time of decision) and not necessarily whether the motive of the parties at the time of commencing the relationship was genuine.*

26. In her written submissions, counsel for the applicant submitted that the Tribunal did not consider the matters identified in reg.1.15A(3) of the Regulations. Counsel submitted that the question before the Tribunal was not whether the parties had a genuine reason to get married, but whether their relationship, irrespective of the circumstances surrounding how it commenced, was genuine and continuing at the time of decision. Counsel particularly relied on the reasoning and decision of Judge Jones in *Malhi v Minister for Immigration & Anor*.²⁶ In that case it was claimed the Tribunal failed to apply the correct test in relation to the expression “genuine and continuing” in s.5F(2)(c) of the Act because the Tribunal “gave great weight to the fact that the applicant and the sponsor had not seriously turned their mind to the question of children”.²⁷ That claim led Judge Jones to consider the meaning of “genuine and continuing”, where her Honour said:²⁸

27. *There is no authority as to what is contemplated by the requirement that the relationship be “genuine and continuing”. The assessment as to whether the relationship is genuine and continuing must focus on the relationship as it is, at the time of the Tribunal decision. The reasons for the parties entering the*

²⁶[2017] FCCA 119

²⁷ [2017] FCCA 119, [31]

²⁸ [2017] FCCA 119, [36]

relationship are not to be taken as an indication that the relationship is not genuine. Parties may enter into a relationship for motives which are not necessarily genuine. It may be that the relationship is commenced for the very purpose of a person obtaining a visa. It may be that the relationship was entered into for reasons which were ill-conceived or precipitous. However, this is not relevant in considering whether the parties, at the time of the Tribunal decision, have a mutual commitment to a shared life Nor, in my opinion, can the conduct or motive at the commencement of the relationship be determinative of whether the parties' relationship at the time of the Tribunal decision is genuine and continuing.

28. Counsel for the applicant referred to the Tribunal's findings in paragraph 11 of its reasons that it was "*not convinced that the fact their families had known each other for some time would guarantee that the applicant would be suitable for each other*", submitting that this was "*an incorrect test*", the correct test being whether the relationship was genuine and continuing at the time of decision. Counsel also referred to the Tribunal's observations in paragraph 12 of its reasons that "*if anyone viewed this relationship as a genuine and a long term one, the applicant and the sponsor and their relatives could have made arrangements for the couple to talk to each other and get to know each other before the sponsor travelled and before they formed a committed relationship*", submitting that this, too, is not an application of the correct test. Finally, counsel submitted that the Tribunal's reasoning in paragraphs 10 to 18 of its reasons for decision discloses the application of a conventional assumption about what was expected in the discussions between the sponsor and the applicant at the commencement of their relationship, but there is nothing in that part of the Tribunal's reasons that suggests the Tribunal was concerned about whether the relationship between the parties was continuing.
29. The Minister, on the other hand, submits the Tribunal did not assess whether the applicant and sponsor were in a genuine or continuing relationship by reference to the reasons for which they entered into their marriage. The Minister submits the Tribunal, consistently with reg.1.15A(2) of the Regulations, considered all of the circumstances of the relationship between the applicant and the sponsor.

30. It is true, as counsel for the applicant submitted, that the Tribunal considered the circumstances in which the applicant and sponsor decided to marry. The Tribunal did so, however, because these were matters on which the applicant and the sponsor relied; and the Tribunal was not bound to accept what the applicant and sponsor said about those circumstances. In considering whether it should accept what the applicant and sponsor said about the circumstances in which they decided to marry, the Tribunal did not accept the evidence of the applicant and the sponsor, and found that the applicant and the sponsor were untruthful. The Tribunal manifested no misunderstanding of the meaning of “*genuine and continuing*” by proceeding in this way.
31. It is also true that the Tribunal relied on its findings that the applicant and the sponsor gave untruthful evidence about the circumstances in which they decided to get married. But the Tribunal relied on that finding as a matter going to the Tribunal’s assessment of the credibility of the applicant and sponsor. That is particularly apparent in the Tribunal’s finding that it was not satisfied the applicant and the sponsor had established a joint household.²⁹ It was reasonably open to the Tribunal to rely on findings it had made that the applicant and sponsor had given untruthful evidence in relation to a part of the matters on which they relied as a reason for not accepting evidence the applicant and the sponsor had given in relation to other parts of the matters on which they relied.
32. The difficulty with the submissions counsel for the applicant has made in support of ground 1 is that they refer only to that part of the Tribunal’s reasons that address the evidence the applicant and the sponsor each gave of the circumstances in which they decided to marry, and ignore the Tribunal’s reasons as a whole. When the Tribunal’s reasons are considered as a whole it is apparent the Tribunal did not assess whether the applicant and sponsor had a genuine and continuing relationship by reference to the circumstances in which the applicant and the sponsor decided to marry. The Tribunal considered, as it was required to do, whether, at the time of its decision, the applicant and sponsor had a mutual commitment to a shared life to the exclusion of all others, and whether they had a genuine and continuing relationship. That is the question the Tribunal answered in the passage from its reasons that I reproduced in paragraph 15 of these reasons. And the

²⁹ CB418, [27]

Tribunal answered that question after it considered the matters reg.1.15A(2) the Regulations required it to consider, these being the financial aspects of the relationship,³⁰ the nature of the household and the living arrangements of the persons,³¹ the social aspect of their relationship,³² and the nature of the couple's commitment to each other.³³

33. Ground 2 of the amended application fails.

34. *Ground 3*

35. Ground 3 of the amended application is as follows:

36. Jurisdictional Error: The Tribunal failed to comply with the statutory requirements of s359A resulting in a lack of exercise of jurisdiction and jurisdictional error.

37. PARTICULARS

38. The Tribunal failed to comply with the requirements of s 359A in that it failed to provide clear particulars of the “standard application form for sponsored visitor visas” referred to in paragraph 18 and the visa application that the applicant filed 2010 and (ii) failed to ensure that the applicant understood why it was relevant to the review and the consequences of it being relied on in affirming the decision.

39. Counsel for the applicant submitted that that part of the standard form of application for a visitor visa the applicant completed that provided for “engaged” as a relationship status was “*information that the Tribunal considered would be the reason, or part of the reasons, for affirming the decision that is under review*” within the meaning of s.359A(1)(a) of the Act, which meant that the Tribunal was required but failed to comply with the requirements of s.359A(1)(b) of the Act. The Minister, on the other hand, submitted that the information contained in the form of application for a visitor visa is not “*information*” for the purposes of s.359A of the Act.

³⁰ CB416-417, [19]-[21]

³¹ CB418, [26]

³² CB417, [22]

³³ CB417-419, [23]-[31]

40. It has been authoritatively decided that “*information*” for the purposes of s.424A of the Act must be information that by its terms constitutes a “*rejection, denial or undermining of*” an applicant’s claim to be a person to whom Australia owes protection obligations.³⁴ Given that s.359A is in substantially similar terms as s.424A of the Act, the notion of “*information*” as it appears in s.359A must be information that by its terms constitutes an “*rejection, denial or undermining of*” an applicant’s claim to be entitled to the visa for which the applicant applies. In the context of the case before me, therefore, the question is whether the form of application for a visitor visa which the applicant completed that providing for “*engaged*” as a relationship status can be seen as reasonably capable of constituting a rejection, denial or undermining wholly or in part any element of the applicants claims for a Partner visa. In my opinion, it cannot. The form of application by itself says nothing about the applicant.
41. The applicant’s complaint appears to be directed, not to the form of application for a visa providing for “*engaged*” as a relationship status (which, as I have already noted, says nothing about the applicant), but to the applicant’s submitting an application for a visitor visa that failed to record the applicant was engaged, thus impliedly representing that the applicant was not engaged, contrary to the applicant’s and the sponsor’s evidence that she and the sponsor were engaged. The question that arises is whether the applicant’s submitting a document that impliedly represented in 2010 that she was not engaged to any person by its terms constituted an “*rejection, denial or undermining of*” the applicant’s claim to be entitled to the Partner visa.
42. The Tribunal found that the applicant’s not having recorded in her application form for a visitor visa that she was engaged was inconsistent with the evidence she and the sponsor gave that in May 2010, before she applied for a visitor visa, the applicant and sponsor were engaged to be married; and, in turn, the Tribunal relied on that inconsistency for not accepting the applicant’s evidence that she and the sponsor first met in April 2010 and had no prior knowledge of each other, and that they only made the decision to marry within two weeks of the sponsor’s travel to Vietnam. As counsel for the applicant herself in effect submitted, whether or not the applicant and the sponsor had agreed to be married in the circumstances

³⁴*SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26, [22]; *Minister for Immigration and Citizenship v SZLFX* [2009] HCA 31, [22]; *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16, [9]

they claimed they did was not an integer of the applicant's claims for the granting of a Partner visa. It follows, therefore, that the Tribunal's relying on the applicant's not disclosing in her application visitor visa that she was engaged, was not information that by its terms constituted a "*rejection, denial or undermining of*" the applicant's claim that, at the time the Tribunal made its decision, the applicant and sponsor had a mutual commitment to a shared life to the exclusion of all others, and they shared a genuine and continuing relationship.

43. Counsel for the applicant submitted that the Tribunal's reliance on the applicant's not having recorded in her application for a visitor visa that she was engaged affected the applicant's claim because it affected the Tribunal's assessment of her credibility. It may be accepted that the Tribunal relied at least in part on the applicant's not recording she was engaged as a ground for taking an adverse view of the applicant's credibility. The relevant question under s.359A of the Act, however, is whether the applicant's not recording in her application for a visitor visa that she was engaged to the sponsor by its terms constituted a "*rejection, denial or undermining of*" the applicant's claim that, at the time the Tribunal made its decision, the applicant and sponsor had a mutual commitment to a shared life to the exclusion of all others, and they shared genuine and continuing relationship. As I have already concluded, it did not.

44. Ground 3, therefore, also fails.

45. *Ground 5*

46. Ground 5 is as follows:

47. Jurisdictional Error: The Tribunal's decision was affected by jurisdictional error in that the Tribunal failed to comply with the trinity of requirements in s 359AA(1) leading to jurisdictional error. The Applicant did not receive a fair and meaningful hearing as required by s 360(1) of the Act because the existence of the certificate diminished the applicant's entitlement to participate effectively in the review in such a way that enlivened the obligation of procedural fairness.

48. PARTICULARS

49. *a. At paragraph 7 of the decision record, the Tribunal referred to [the] allegation, which was subject to a s375A certificate. In the course of the review, information, which was adverse to the Applicant's claim was provided to the Tribunal pursuant to s375A of the Act. However, the Tribunal failed to comply with the requirements of s 359AA(1) with respect to the adverse information*
50. *b. The existence of the certificate was incompatible with the Applicant's interests and curtailed the nature of the hearing afforded to the Applicant such that it was not a real or meaningful hearing[.]*
51. It is apparent that ground 5 makes two claims. The first is that the 375A Certificate or the information contained in the document covered by the 375A Certificate is information to which s.359A of the Act applied, and that the Tribunal was required to give particulars of that information either in the manner provided for by s.359A(2) of the Act or during the hearing in the manner provided for by s.359AA(1). The second claim is that the Tribunal denied the applicant procedural fairness because of the existence the s.375A Certificate.
52. The first claim is premised on the assumption that the information covered by the 375A Certificate is information to which s.359A of the Act applied; that is, it is information the Tribunal considered “*would be the reason, or a part of the reason, for affirming the decision*” of the delegate. Counsel for the applicant confirmed that it is the applicant's case the Tribunal considered this information “*would be the reason, or a part of the reason, for affirming the decision*” of the delegate.
53. The Tribunal did in its reasons for decision refer to the information covered by the 375A Certificate. But all it said about the information was that it was “*mindful*” the Department received an allegation that the applicant's and the sponsor's relationship had been contrived; that the delegate wrote to the applicant seeking her comments on the allegation, and the applicant's having provided a written response to the delegate; that the allegation had been recorded in the “*primary record decision*”, that is, the delegate's decision; and the Tribunal discussed the substance of the allegation at the hearing. The Tribunal did not otherwise refer to the information covered by the 375A Certificate when considering the matters it was required to

consider under reg.1.15A of the Regulations. In those circumstances I am not prepared to find that the Tribunal at any stage considered that the information covered by the 375A Certificate “*would be the reason, or a part of the reason, for affirming the decision*”; and, for that reason, I am not prepared to find that s.359A applied to the information covered by the 359A Certificate.

54. Next, I turn to the claim that the applicant was denied procedural because of the existence the s.375A Certificate. This part of the claim was not developed by counsel for the applicant, either in her written submissions or during oral address. As stated, the claim is that the applicant was denied access to the information covered by the 379A Certificate. There are two things to be said about that.
55. First, it appears from the Tribunal’s reasons that during the hearing the applicant was made aware of the existence of the 375A Certificate.³⁵ There is no suggestion the applicant sought the production of that certificate or otherwise sought to challenge it. Secondly, as the Tribunal noted in its reasons, the substance of the information was disclosed to the applicant by the delegate; the applicant responded; and the delegate disclosed the substance of the information in his reasons for decision. As I have already noted, the document that contains the information that is covered by the 375A Certificate is in evidence; but the applicant has not submitted that that which the delegate had disclosed to the applicant, both by letter and in her reasons for decision, and that which the Tribunal said it disclosed to the applicant during the hearing, did not reflect the substance of the information covered by the 375A Certificate. I find that the delegate did disclose the substance of the information and, given there is no evidence of the transcript of the hearing before the Tribunal, I am not prepared to find the Tribunal did not disclose to the applicant the substance of the information. In those circumstances, I do not accept that the 375A Certificate denied the applicant of being given fair notice of the substance of the information covered by it.
56. Finally, even if, contrary to my conclusion, the applicant had not been given fair notice of the information covered by the 375A Certificate, the Tribunal did not rely on that information in affirming the delegate’s decision. That means that any failure by the Tribunal to give proper notice of the information covered by the 375A Certificate could not have made any

³⁵ CB414, [7]: “[T]he applicant was put on notice of its existence at the time of the hearing.”

difference to the outcome of the review,³⁶ and the failure could not have operated to deprive the applicant the possibility of a successful outcome.

57. Ground 5, therefore, also fails.

58. Conclusion and disposition

59. The applicant has not succeeded on any of the grounds on which she relied. I propose, therefore, to dismiss the application. I will consider the question of costs when I pronounce my order.

I certify that the preceding forty-one (41) paragraphs are a true copy of the reasons for judgment of Judge Manousaridis

Associate:

Date: 22 May 2019

³⁶*Minister for Immigration and Border Protection v SZMTA; CQZ15 v Minister for Immigration and Border Protection; BEG15 v Minister for Immigration and Border Protection* [2019] HCA 3, at [3], [123]